STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 22, 2002
v	No. 223459 Wayne Circuit Court
ANTHONY G. HUNT, Defendant-Appellant.	LC No. 99-001344

Before: Griffin, P.J., and Gage and Meter, JJ.

PER CURIAM.

Defendant was originally charged with assault with intent to commit murder, MCL 750.83, first-degree criminal sexual conduct (CSC), MCL 750.520b, felonious assault, MCL 750.82, three counts of assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. Following a jury trial, he was convicted as charged for the counts of first-degree CSC, felonious assault, one count of assault with intent to commit great bodily harm, and felony-firearm. He was also convicted of a second count of felonious assault as a lesser offense of the assault with intent to commit murder charge, and was acquitted of the remaining two counts of assault with intent to do great bodily harm. The trial court sentenced defendant to concurrent prison terms of twenty to fifty years for the first-degree CSC conviction, six to ten years for the assault with intent to do great bodily harm conviction, and thirty to forty-eight months each for the felonious assault convictions, to be served consecutive to a two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

The victim in this case was defendant's wife, from whom he was separated. At the time of the offense, the victim was living in her own apartment, which defendant helped her acquire. According to the victim, on the day of the offense, defendant picked the victim up from work and confronted her with a telephone book he had taken from the victim's apartment. While in the car, defendant attacked the victim by hitting her in the head and threatening her with a gun. Once they arrived at defendant's house, defendant again attacked the victim with the gun and burned her with boiling water. Defendant then proceeded to sexually assault the victim.

I

Defendant argues that he was denied his right to represent himself at trial. We disagree. The record indicates that defendant was allowed to represent himself during the initial stages of this case and counsel was appointed to assist him. Defendant was allowed to represent himself at his preliminary examination with the aid of standby counsel, who handled the questioning at that hearing. At a subsequent pretrial conference, defendant informed the court that he no longer wished to represent himself even though he had filed numerous motions on his own behalf. Defendant was thereafter represented by the court-appointed counsel at trial.

A defendant has the constitutional right to act as his own counsel, but the right is not absolute. *People v Dennany*, 445 Mich 412, 426-427; 519 NW2d 128 (1994). This right conflicts with the right to counsel. Consequently, courts must indulge every presumption against a waiver of the right to counsel. *People v Adkins (After Remand)*, 452 Mich 702, 720-721; 551 NW2d 108 (1996). In order for a defendant to properly proceed in propria persona, the court must find the following: (1) that the defendant's request for self-representation is unequivocal, (2) that the defendant is asserting his right to proceed in propria persona knowingly, intelligently and voluntarily, and (3) that allowing the defendant to represent himself will not disrupt, unduly inconvenience or burden the court and the administration of its business. *Dennany, supra* at 432. Before a court may accept a defendant's waiver of the right to counsel, the court must satisfy the requirements of MCR 6.005 and advise the defendant of the risks of proceeding without counsel. *People v Belanger*, 227 Mich App 637, 642; 576 NW2d 703 (1998). Additionally, if the court does not believe that the record reflects a proper waiver of the right to counsel, it should state its reasons on the record and require counsel to continue to represent the defendant. *Adkins (After Remand), supra* at 721, 727.

We find no merit to defendant's claim that the judge at his preliminary examination was obligated to comply with the requirements for a waiver set forth in *Dennany, supra*, and MCR 6.005(D). The record reflects that defendant had previously been allowed to represent himself at an earlier hearing before another judge and that standby counsel had been appointed to assist defendant. Accordingly, the judge at the preliminary examination was only required to comply with MCR 6.005(E); he was not obliged to question defendant anew about representing himself.

Similarly, at the time of the pretrial conference in the circuit court, the judge was again obligated only to question defendant in accordance with MCR 6.005(E). Because defendant informed the court at that point that he now wished to proceed with counsel, he waived his right to self-representation at trial.

II

Next, defendant argues that the trial court erred by scoring fifty points for offense variable (OV) 12 of the sentencing guidelines.[1] Because defendant did not object to the scoring of OV 12 at sentencing, this issue is not preserved. MCR 6.429(C). Even if we review this issue for plain

[1] Because the charged crimes were committed before January 1, 1999, the trial court properly used the former judicial sentencing guidelines, rather than the new statutory sentencing guidelines. MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000).

error affecting defendant's substantial rights, see *People v Kimble*, 252 Mich App 269, 275; 651 NW2d 798 (2002), we would conclude that appellate relief is not warranted. An error in the scoring of the guidelines is harmless if it does not change the recommended minimum sentence range. *People v James Johnson*, 202 Mich App 281, 290; 508 NW2d 509 (1993); *People v Ratkov (After Remand)*, 201 Mich App 123, 127; 505 NW2d 886 (1993), remanded on other grounds 447 Mich 984 (1994). Here, any error in the scoring of OV 12 would not have affected defendant's recommended minimum sentence range for the first-degree CSC conviction. Accordingly, appellate relief is not warranted.

III

Defendant raises numerous issues in a supplemental pro se brief. Most of the issues were not raised in the trial court and, therefore, were not preserved for appellate review. *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734 (1995). Where an issue was not preserved in the trial court, a defendant must show that a plain error (i.e., one that is clear or obvious) affected his substantial rights. The defendant has the burden of demonstrating that he was prejudiced by the error, i.e., that the outcome was affected. Even if these requirements are met, a reviewing court should not reverse unless it concludes that the defendant is actually innocent or the error seriously affected the fairness, integrity or public reputation of the judicial proceedings. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999).

Defendant first claims that reversal is required because his arraignment on the warrant was unreasonably delayed beyond forty-eight hours after his arrest, contrary to *Riverside Co v McLaughlin*, 500 US 44; 111 S Ct 1661; 114 L Ed 2d 49 (1991). A delay of more than forty-eight hours is considered presumptively unreasonable absent extraordinary circumstances. *People v Manning*, 243 Mich App 615, 622-623; 624 NW2d 746 (2000). Where the delay exceeds forty-eight hours, the burden falls on the government to demonstrate that extraordinary circumstances necessitated the delay. *Id*. at 623.

In this case, it is not apparent from the record that there was an unreasonable delay or, if so, what caused that delay. There are some indications that any delay was necessitated by medical problems that defendant was experiencing. Regardless, defendant has not shown that any delay affected the fairness of these proceedings. He did not make any statements that were later offered against him, nor does defendant identify how he was otherwise prejudiced by the delay. *Id*. at 632-636, 642, 644-645. Defendant has failed to demonstrate either a plain error or shown that his substantial rights were affected by any error. *Carines, supra*.

IV

Defendant also challenges the validity of his arrest. Defendant did not preserve this issue by raising it below. Defendant relies on the rule that the police may not arrest a person in the person's home without a warrant absent exigent circumstances. *People v Parker*, 417 Mich 556, 561; 339 NW2d 455 (1983). That rule exists because entry into a person's home amounts to an illegal search under the Fourth Amendment. See *Payton v New York*, 445 US 573, 589; 100 S Ct 1371; 63 L Ed 2d 639 (1980). However, the rule from *Payton* does not apply if a person consents to the officers' entry into the home. *City of Troy v Ohlinger*, 438 Mich 477, 485-486; 475 NW2d 54 (1991); *People v Oliver*, 417 Mich 366, 379; 338 NW2d 167 (1983).

The facts in this case indicate that defendant consented to the arresting officer's entry into defendant's home. In this circumstance, the officer could properly enter defendant's home and arrest him without a warrant. Defendant has failed to show a plain error. *Carines, supra*.

V

Defendant next argues that he was deprived of his right to due process at the time of his arraignment. We deem this issue abandoned for failure to specify either a legal or factual basis for the claim. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001); *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001).

VI

Defendant complains that his preliminary examination was not held within fourteen days, contrary to MCL 766.4. See also MCR 6.104(E)(4) and 6.110(B)(1).

While the statute requires that a preliminary examination be conducted within fourteen days after arraignment, the examination may be adjourned for good cause shown. MCR 6.110(B)(1). See also MCL 766.7. Once a preliminary examination is adjourned for good cause, the examination need not be rescheduled within fourteen days. Cf. *People v Frank Johnson*, 146 Mich App 429, 438; 381 NW2d 740 (1985). Here, the record indicates that the court initially scheduled the preliminary examination within the required fourteen-day period, but adjourned it at defendant's request. The court thereafter adjourned the examination again so that defendant could undergo a competency examination, and subsequent adjournments were likewise allowed at defendant's request.

In sum, the record reflects that there was good cause to adjourn the originally scheduled preliminary examination. Accordingly, defendant has not shown plain error. *Carines, supra*. Additionally, defendant never complained that the preliminary examination was not timely and, therefore, has waived the right to complain about any delay. MCR 6.110(B)(2).

VII

Defendant claims that reversal is required because the prosecutor knowingly used, or allowed to stand uncorrected, perjured testimony by the victim. Consistent with the Due Process Clause of the federal constitution, US Const, Am XIV, criminal prosecutions must comport with notions of fundamental fairness. Consequently, prosecutors have a constitutional obligation to report to both the defendant and the trial court whenever a prosecution witness lies under oath. *People v Herndon*, 246 Mich App 371, 417; 633 NW2d 376 (2001). In addition, the prosecution may not knowingly use false testimony in order to acquire a conviction and the prosecution has a duty to correct any false evidence. *Id.* A prosecutor may not allow false testimony to stand even if it only affects a witness' credibility. *People v Wiese*, 425 Mich 448, 453-454; 389 NW2d 866 (1986). After reviewing the portions of the victim's testimony cited by defendant, we find no merit to this claim. The cited testimony fails to show either that the victim perjured herself at trial or that the prosecution knowingly presented or failed to correct false testimony. Defendant has not established a plain error. *Carines, supra.*

VIII

Next, defendant appears to challenge the trial court's decision to allow his stepsister, Pamela West, to testify about statements the victim made to her identifying defendant as the person who caused her injuries, thereby bolstering the victim's credibility at trial.

Defendant objected to the testimony at trial on the ground that it was hearsay. The trial court apparently concluded that the testimony was not hearsay because it was not being offered for the truth of the matter asserted. MRE 801(c); *People v Tanner*, 222 Mich App 626, 629; 564 NW2d 197 (1997). Because it appears that the testimony was offered only to show that the victim had identified defendant as the perpetrator from the beginning, not for the truth of the matter asserted, the trial court did not abuse its discretion in admitting the evidence. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

IX

Defendant also claims that the trial court erred by not addressing or ruling on several motions that he filed in propria persona. According to the record, defendant's attorney later informed the court that it did not need to rule on the motions because he would be handling the matters, most of which involved discovery. In light of this record, we conclude that this issue is waived. *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998).

X

Defendant next argues that his attorney was ineffective. Defendant did not raise this issue in a motion for new trial or evidentiary hearing in the trial court. Although he filed a motion to remand with this Court, the motion was denied. Therefore, review of this issue is limited to mistakes apparent on the record. *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001).

We disagree with defendant's claim that he is not required to show prejudice as a result of the alleged errors by counsel. In order for this Court to reverse due to ineffective assistance of counsel, a defendant must show not only that counsel's performance fell below an objective standard of reasonableness, but also that the representation so prejudiced the defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). To establish prejudice, the defendant must show that there was a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996). The burden is on the defendant to produce factual support for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Limiting our review to the record, defendant has not demonstrated that he was prejudiced by any of the alleged errors by trial counsel. Accordingly, defendant has not met his burden on this issue. *Pickens, supra*; *Johnson, supra*.

XI

In Issue IX of his brief on appeal, defendant reiterates the arguments made by appellate counsel in Issue I, i.e., that he was denied the right to represent himself. We have already rejected that argument in part I of this opinion.

XII

In Issue X of his brief on appeal, defendant states that error occurred when a witness was allowed to testify after the court had ruled in defendant's favor. We deem this issue abandoned on appeal because defendant does not explain either the factual or legal basis for this claim. *Watson, supra*; *Traylor, supra*.

XIII

Relying on *People v Kelley*, 142 Mich App 671, 672-673; 370 NW2d 321 (1985) and *People v Pullins*, 145 Mich App 414, 422-423; 378 NW2d 502 (1985), defendant argues that the prosecutor impermissibly injected her personal knowledge of this case when she informed the jury that the case was worse than a movie they may have seen on television, like "the Burning Bed with Farah Fawcett." Defendant did not preserve this issue with an appropriate objection at trial. Defendant seems to suggest that the prosecutor's remarks crossed the line of proper comment because she attempted to compare defendant to notorious figures and also relied on her own personal knowledge. We disagree. The prosecutor did not rely on her personal knowledge about defendant, but based her comments on the facts and evidence. The references to the movies were not so egregious because the prosecutor did not compare defendant to a notorious criminal figure, as occurred in *Kelley* and *Pullins, supra*. Further, any perceived prejudice could have been cured with a cautionary instruction had defendant properly objected. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Defendant has not shown that a plain error affected his substantial rights. *Carines, supra*.

Further, for the reasons discussed in part VII of this opinion, we find no merit to defendant's claim that the prosecutor knowingly allowed perjured testimony to stand uncorrected.

XIV

Defendant next claims that the trial court's conduct deprived him of a fair trial. Defendant did not preserve this issue by objecting to any of the allegedly improper conduct at trial.

A defendant in a criminal case is entitled to have his case heard by a "neutral and detached magistrate." *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996), quoting *People v Moore*, 161 Mich App 615, 619; 411 NW2d 797 (1987). The principal question is whether the judge's conduct pierced the veil of judicial impartiality. *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996). In reviewing the trial court's remarks, the following standards apply:

> A trial court has wide, but not unlimited, discretion and power in the matter of trial conduct. *Id*. at 698. [*People v Collier*, 168 Mich App 687; 425

> NW2d 118 (1988).] Portions of the record should not be taken out of context in order to show trial court bias against defendant; rather the record should be reviewed as a whole. *Id*. at 697-698. A trial court's conduct pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial. *Id*. at 698. [*People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995).]

After reviewing the record, we disagree with defendant's claim that the trial court made prejudicial comments during voir dire. The court's response to the jury's request for reinstruction, considered in context, was not prejudicial. Further, the record does not support defendant's claim that the trial court refused to provide certain documentary evidence to the jury. The jury made a specific request for all written statements, but none were admitted. The record indicates that the jury was otherwise provided with all of the exhibits from trial. Defendant has failed to show plain error with regard to the court's conduct at trial. *Carines, supra*.

XV

Although defendant appears to claim that both the prosecutor and the judge improperly shifted the burden of proof in this case, he does not identify the factual basis for this claim. Accordingly, we have no basis for concluding that error occurred. *Traylor, supra*.

XVI

We deem abandoned defendant's claim that his rights were violated because of the multiple charges filed against him. Defendant does not identify either the factual or legal basis for his claim. *Watson, supra*; *Traylor, supra*. To the extent defendant argues that it was improper to charge him with three counts of assault with intent to commit great bodily harm because the evidence failed to show that more than one assault was committed, it is apparent that defendant was not prejudiced because he was convicted of only one count of assault with intent to commit great bodily harm, and was acquitted of the other two counts.

XVII

MCL 750.520l authorized defendant's conviction for first-degree CSC even though the victim was defendant's wife at the time of the offense. Defendant now argues that MCL 750.520l is unconstitutional. Because defendant did not challenge the constitutionality of the statute in the trial court, this issue is not preserved.

MCL 750.520l presently provides that "[a] person may be charged and convicted under sections 520b to 520g [MCL 750.520b to MCL 750.520g] even though the victim is his or her legal spouse[.]" The present version of MCL 750.520l became effective on June 1, 1988, and applies to crimes committed after that date. The former version of the statute provided that "[a] person does not commit sexual assault under this act if the victim is his or her legal spouse, unless the couple are living apart and one of them has filed for separate maintenance or divorce." See *People v Kubasiak*, 98 Mich App 529, 533-535; 296 NW2d 298 (1980). Thus, before adoption of the present version of MCL 750.520l, a man could not be found guilty of raping his wife. *Id*. at 534, citing *People v Pizzura*, 211 Mich 71, 73; 178 NW 235 (1920).

Defendant appears to argue that the Legislature could not constitutionally eliminate any type of spousal immunity with regard to criminal sexual conduct. Because the present version of MCL 750.520l became effective in 1988, defendant is charged with notice of that statute, which applies to this case.

We find no merit to defendant's claim that MCL 750.520l is unconstitutional because it is vague or ambiguous. Statutes are presumed to be constitutional and unless the unconstitutionality is readily apparent, statutes must be construed to be constitutional. *People v Rogers*, 249 Mich App 77, 94; 641 NW2d 595 (2001).

> There are three grounds for challenging a statute for vagueness: (1) the statute is overbroad and impinges on First Amendment freedoms, (2) the statute fails to provide fair notice of the proscribed conduct, and (3) the statute is so indefinite that it confers unfettered discretion on the trier of fact to determine whether the law has been violated. [*Id.* at 94-95.]

In determining whether a statute is vague, an appellate court should consider the entire text of the statute, as well as any judicial constructions of the statute. *Id*. at 94.

First, defendant has failed to show that the statute impinges on any of his First Amendment freedoms. If a person commits a sexual assault against a spouse, that does not implicate any First Amendment rights with regard to the marital relationship.

Second, as noted above, MCL 750.520l became effective well before the charged offense was committed, giving defendant fair notice of the proscribed conduct. In addition, the plain wording of MCL 750.520l provides fair notice of what conduct is prohibited.

Third, MCL 750.520l does not confer such unfettered discretion on the trier of the fact to determine whether the statute has been violated. The statute clearly bars any type of criminal sexual conduct committed against a person's spouse.

Defendant also appears to raise an equal protection argument with regard to MCL 750.520l, but the basis for his argument is unclear. Regardless, we are satisfied that any such claim lacks merit.

XVIII

Defendant next argues that his attorney was ineffective for not filing a direct appeal earlier in this matter. Defendant presumably is referring to counsel's failure to file an interlocutory application for leave to appeal some of the trial court's earlier rulings. The case on which defendant relies, *Ludwig v United States*, 162 F3d 456, 459 (CA 6, 1998), holds that it is a per se violation of a defendant's rights under the Sixth Amendment for an attorney to fail to appeal a judgment. In this case, defendant has been afforded his right of appeal from his convictions. In contrast to this constitutional right of appeal, a defendant does not have a constitutional right to pursue an interlocutory appeal. Further, it is not apparent from the record that defendant requested his attorney to pursue an interlocutory appeal or, if so, what factors

counsel may have considered in deciding not to pursue such an appeal. Thus, the record does not support a finding that counsel was ineffective in this regard. *Pickens, supra*.

XIX

Defendant's claims regarding jury selection were not preserved with an appropriate objection at trial. Indeed, defendant expressed satisfaction with the jury as chosen. Of the three venire members that defendant now challenges on appeal, only one actually served on defendant's jury. The record does not demonstrate that this juror's state of mind prevented her from rendering a just verdict, MCR 2.511(D)(4); *People v Lee,* 212 Mich App 228, 249; 537 NW2d 233 (1995), or that she was biased for or against a party or an attorney, MCR 2.511(D)(3). Thus, defendant has not demonstrated plain error. Nor does the record show that plain error occurred as a result of comments made by the judge during voir dire. *Carines, supra*.

XX

Defendant argues that his presentence investigation report contains erroneous information. Defendant did not object to the accuracy of the presentence report at sentencing. On appeal, defendant does not identify what portions are inaccurate. Although defendant refers to OV 12 being improperly scored, the presentence report does not contain any information suggesting that defendant committed more than one sexual penetration, so this reference does not support a finding of inaccuracy. Because defendant has failed to specify the factual basis for his claim that the presentence report is inaccurate, appellate relief is precluded. *Traylor, supra*.

XXI

Defendant contends that the cumulative effect of the errors in this case deprived him of a fair trial. Although a single error in a trial may not necessarily provide a basis for reversal, it is possible that the cumulative effect of multiple minor errors may add up to error requiring reversal. *People v Anderson*, 166 Mich App 455, 472-473; 421 NW2d 200 (1988). The test is whether the cumulative effect deprived the defendant of a fair and impartial trial. *People v Taylor*, 185 Mich App 1, 10; 460 NW2d 582 (1990). We have rejected most of defendant's claims of error in this case. Any errors that did occur were harmless and, whether considered singularly or cumulatively, did not deprive defendant of a fair trial.

Affirmed.

/s/ Richard Allen Griffin
/s/ Hilda R. Gage
/s/ Patrick M. Meter